

**United States Department of Labor
Employees' Compensation Appeals Board**

N.V., Appellant

and

**U.S. POSTAL SERVICE, LAUDERRIDGE
CARRIER ANNEX, Fort Lauderdale, FL,
Employer**

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**Docket No. 20-0080
Issued: January 21, 2022**

Appearances:

*Joanne M. Wright, for the appellant¹
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

JANICE B. ASKIN, Judge
PATRICIA H. FITZGERALD, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On October 10, 2019 appellant, through his representative, filed a timely appeal from an April 24, 2019 merit decision of the Office of Workers' Compensation Programs (OWCP).² Pursuant to the Federal Employees' Compensation Act³ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of this case.

¹ In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

² The Board notes that appellant, through his representative, specifically appealed OWCP's April 24, 2019 merit decision. Although OWCP's May 9, 2019 merit decision is within the Board's jurisdiction, the representative did not appeal that decision. *See* 20 C.F.R. § 501.3(a) and (c).

³ 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether appellant received an overpayment of compensation in the amount of \$59,419.51 for the period May 1, 2012 through October 13, 2018 because he concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits without an appropriate offset; (2) whether OWCP properly found appellant at fault in the creation of the overpayment, thereby precluding waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$1,000.00 from appellant's continuing FECA compensation, every 28 days.

FACTUAL HISTORY

On April 25, 2011 appellant, then a 64-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on April 23, 2011 he sustained a left knee sprain when he lifted a tub of mail to load it into his vehicle while in the performance of duty. He stopped work on the date of injury. On June 15, 2011 OWCP accepted appellant's claim for left knee sprain of the lateral collateral ligament and tear of the medial meniscus, and authorized left knee arthroscopic surgery performed on April 23, 2011. Appellant stopped work on May 13, 2011. OWCP paid him wage-loss compensation for total disability on the supplemental rolls as of June 27, 2011, and on the periodic rolls as of July 3, 2011.

In a letter dated July 18, 2011, OWCP informed appellant of his entitlement to wage-loss compensation benefits. In an attached Form EN1049, it further informed him that he had to report any retirement income received from any federal agency and that he could not receive both FECA benefits and Federal Employees Retirement System (FERS) retirement benefits without an appropriate offset for SSA age-related retirement benefits. OWCP advised appellant to immediately report if he filed for or received benefits from SSA.

On June 28, 2018 OWCP provided SSA with a FERS/SSA dual benefits worksheet. No response was received. On September 20, 2018 OWCP again requested that SSA provide a dual benefits calculation on the form it had provided. SSA returned the form on October 19, 2018, indicating that: beginning in May 2012 appellant's SSA rate with FERS was \$2,024.90 and without FERS was \$1,290.50; beginning in December 2012, his SSA rate with FERS was \$2,059.30 and without FERS was \$1,312.40; beginning in December 2013, his SSA rate with FERS was \$2,090.10 and without FERS was \$1,332.00; beginning in December 2014 and December 2015, his SSA rate with FERS was \$2,125.60 and without FERS was \$1,354.60; beginning in December 2016, his SSA rate with FERS was \$2,139.90 and without FERS was \$1,358.60; and beginning in December 2017, his SSA rate with FERS was \$2,174.50 and without FERS was \$1,385.70.

In a letter dated October 30, 2018, OWCP notified appellant that, based on information provided by SSA regarding the amount of his SSA benefits attributable to federal service, it had adjusted his FECA wage-loss compensation per section 10.421(d) of its regulations and that he would receive net compensation of \$2,108.80 every 28 days after the SSA offset, effective October 14, 2018.

On November 8, 2018 OWCP issued a preliminary overpayment determination finding that an overpayment of compensation in the amount of \$59,419.51 had been created. It explained that

the overpayment occurred because a portion of appellant's SSA age-related retirement benefits that he received for the period May 1, 2012 through October 13, 2018 were based on credits earned while working in the Federal Government, and that this portion of his SSA benefit was a prohibited dual benefit as there had not been an appropriate offset. OWCP further made a preliminary determination that appellant was at fault in the creation of the overpayment because he had accepted a payment that he knew or reasonably should have known was incorrect. It provided an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20) for his completion. OWCP explained its calculation of the overpayment, informed appellant of the actions he could take, and afforded him 30 days to respond.

On December 6, 2018 appellant requested a prerecoumpment hearing before a representative of OWCP's Branch of Hearings and Review. He contested the fact and amount of the alleged overpayment and requested waiver of recovery of the overpayment as he believed that the overpayment occurred through no fault of his own. In an attached statement, appellant contended that he had not received any information from SSA showing the amount of benefits he derived from his federal employment, and thus, asserted that he had no independent confirmation regarding the amount attributable to his federal employment. He noted that his accountant had calculated that he could have received 32 percent more in monthly benefits had he chosen to wait until age 70 to collect SSA retirement and that he had incurred \$3,500.00 to \$5,000.00 in additional income tax liability, thus he disagreed with the amount of the overpayment, noting that at no time was he aware that he was receiving a dual benefit. Appellant claimed that neither SSA nor OWCP informed him about the dual benefit.

A telephonic prerecoumpment hearing was held on March 13, 2019. Appellant again asserted that he was without fault in the creation of the overpayment.

Following the hearing, appellant submitted a completed Form OWCP-20 dated April 8 2019. He listed total monthly income of \$7,309.61, monthly expenses of \$2,008.42, and funds of \$356,559.16.⁴ Appellant also submitted financial documentation to support his reported income and expenses.

By decision dated April 24, 2019, OWCP's hearing representative finalized the preliminary overpayment determination that appellant received a \$59,419.51 overpayment of compensation for the period May 1, 2012 through October 13, 2018, because he had received a prohibited dual benefit due to his concurrent receipt of FECA compensation and SSA age-related retirement benefits without an appropriate FERS offset. She further found that he was at fault in the creation of the overpayment because he had accepted a payment which he knew, or reasonably should have known, to be incorrect, thereby precluding waiver of recovery of the overpayment. The hearing representative ordered recovery of the overpayment by deducting \$1,000.00 every 28 days from appellant's continuing FECA compensation payments.⁵

⁴ The Board notes that appellant's reported assets totaled \$282,079.56.

⁵ OWCP, by decision dated May 9, 2019, also finalized the preliminary overpayment determination and addressed the method of recovery of the overpayment, noting the same findings as in the hearing representative's April 24, 2019 decision.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his or her duty.⁶ Section 8116 limits the right of an employee to receive compensation. While an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.⁷

Section 10.421(d) of OWCP's implementing regulations requires OWCP to reduce the amount of compensation by the amount of any SSA age-related benefits that are attributable to the employee's federal service.⁸ FECA Bulletin No. 97-09 provides that FECA benefits have to be adjusted for the FERS portion of SSA benefits because the portion of the SSA benefit earned as a federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.⁹

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$59,419.51 because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits, without an appropriate offset, for the period May 1, 2012 through October 13, 2018.

OWCP found that an overpayment of compensation was created for the period May 1, 2012 through October 13, 2018 based on the evidence it had received from SSA with respect to age-related retirement benefits paid to appellant. The information provided by SSA established that appellant received SSA age-related retirement benefits that were attributable to federal service beginning May 1, 2012, but there had been no offset from his periodic FECA compensation until October 13, 2018. Accordingly, the Board finds that it properly determined that appellant received an overpayment of wage-loss compensation for the period May 1, 2012 through October 13, 2018.

To determine the amount of the overpayment, the portion of the SSA benefits that were attributable to federal service must be calculated. OWCP received documentation from SSA with respect to the specific amount of SSA age-related retirement benefits that were attributable to federal service. The SSA provided appellant's SSA rate with FERS and without FERS for the period May 2012 through December 2017. OWCP provided its calculations of the amount that it should have offset during the relevant period based on the SSA worksheet. No contrary evidence was provided.

⁶ 5 U.S.C. § 8102(a).

⁷ *Id.* at § 8116.

⁸ 20 C.F.R. § 10.421(d); *see L.W.*, Docket No. 19-0787 (issued October 23, 2019); *J.B.*, Docket 19-1244 (issued December 20, 2019); *L.J.*, 59 ECAB 264 (2007).

⁹ FECA Bulletin No. 97-09 (February 3, 1997); *see also L.W.*, *id.*; *J.B.*, *id.*

The Board has reviewed OWCP's calculation of benefits received by appellant for the period May 1, 2012 through October 13, 2018 and finds that OWCP properly calculated an overpayment of compensation in the amount of \$59,419.51.¹⁰

LEGAL PRECEDENT -- ISSUE 2

Section 8129(a) of FECA provides that an overpayment of compensation shall be recovered by OWCP unless "incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or be against equity and good conscience."¹¹ No waiver of payment is possible if appellant is at fault in helping to create the overpayment.¹²

Section 10.433(a) of OWCP's regulations provides that an individual is at fault in the creation of an overpayment who: (1) made an incorrect statement as to a material fact which the individual knew or should have known to be incorrect; or (2) failed to furnish information which the individual knew or should have known to be material; or (3) with respect to the overpaid individual only, accepted a payment which the individual knew or should have been expected to know was incorrect.¹³ With respect to whether an individual is not at fault, section 10.433(b) provides that whether or not OWCP determines that an individual was at fault with respect to the creation of an overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.¹⁴

When a claimant receives benefits from the SSA as part of an annuity under FERS concurrently with disability/wage-loss compensation, the claimant should be found without fault unless there is evidence on file that the claimant was aware that the receipt of full SSA benefits concurrent with disability/wage-loss compensation was prohibited.¹⁵

ANALYSIS -- ISSUE 2

The Board finds that OWCP improperly found that appellant was at fault in the creation of the overpayment for the period May 1, 2012 through October 13, 2018.

The Federal (FECA) Procedure Manual identifies that, regarding an SSA dual benefits scenario, where the claimant receives SSA benefits as part of an annuity under FECA, which results in an overpayment, the claimant should be found not at fault unless there is evidence on file

¹⁰ *L.W.*, *supra* note 8; *J.B.*, *supra* note 8.

¹¹ 5 U.S.C. § 8129; *see A.S.*, Docket No. 17-0606 (issued December 21, 2017).

¹² *J.B.*, *supra* note 8; *Robert W. O'Brien*, 36 ECAB 541, 547 (1985).

¹³ 20 C.F.R. § 10.433(a); *see C.L.*, Docket No. 19-0242 (issued August 5, 2019); *see also* 20 C.F.R. § 10.430.

¹⁴ *Id.* at § 10.433(b); *C.L.*, *id.*; *see also* Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Determinations in an Overpayment*, Chapter 6.300.4(d) (September 2018).

¹⁵ *Id.* at Chapter 6.300.4g(4) (September 2018).

that the claimant was aware that the receipt of full SSA benefits concurrent with disability/wage-loss compensation was prohibited.¹⁶ Because of the complex nature of SSA benefits administration, appellant could not have been expected to be able to calculate the amount of an offset. Therefore, he could not reasonably have been aware during the relevant period that his concurrent receipt of SSA benefits constituted an actual prohibited dual benefit.¹⁷

To determine if an individual was at fault with respect to the creation of an overpayment, OWCP examines the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.¹⁸ The Board finds that appellant was without other options to avoid a potential FECA overpayment. Therefore, based on the circumstances described, the Board finds that OWCP has not met its burden of proof to establish that he was at fault in the creation of the overpayment for the period May 1, 2012 through October 13, 2018.¹⁹

As appellant was without fault in the creation of the overpayment for the period May 1, 2012 through October 13, 2018, the case will be remanded to OWCP to consider the issue of waiver of recovery of the overpayment.²⁰

CONCLUSION

The Board finds that appellant received \$59,419.51 overpayment of compensation because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits for the period May 1, 2012 through October 13, 2018, without an appropriate offset. The Board further finds that he was without fault in the creation of the overpayment for the period May 1, 2012 through October 13, 2018.

¹⁶ *Id.*

¹⁷ See *D.W.*, Docket No. 20-1533 (issued May 27, 2021); *J.B.*, Docket No. 19-0757 (issued April 16, 2021); *R.W.*, Docket No. 19-0334 (issued August 7, 2020); *J.B.*, *supra* note 8; see also *G.G.*, Docket No. 19-0684 (issued December 24, 2019) (Due to the complexity of SSA age-related retirement benefits administration, appellant was not at fault in the creation of the overpayment because he could not have reasonably known that an improper payment had occurred. OWCP determined that appellant was not expected to be able to calculate the amount of the offset prior to receipt of information for the SSA).

¹⁸ *Supra* note 14 at § 10.433(b); see also Federal (FECA) Procedure Manual, *supra* note 14 at Chapter 6.3004(d) (September 2018); *J.S.*, Docket No. 19-0824 (issued October 4, 2019).

¹⁹ See *D.W.*, *supra* note 17; *J.B.*, *supra* note 17; *R.W.*, *supra* note 17; *J.B.*, *supra* note 8.

²⁰ In light of the Board's disposition of Issue 2, Issue 3 is rendered moot.

ORDER

IT IS HEREBY ORDERED THAT the April 24, 2019 decision of the Office of Workers' Compensation Programs is affirmed in part and reversed in part, and the case is remanded for further proceedings consistent with this decision of the Board.

Issued: January 21, 2022
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board